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IN THE  
**Supreme Court of the United States**

October Term, 1943

No. 425

WILLIAM K. JACOBS, JR.,

*Petitioner,*

*vs.*

JANE M. HOEY, as executrix of the Estate of  
James J. Hoey, Deceased,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

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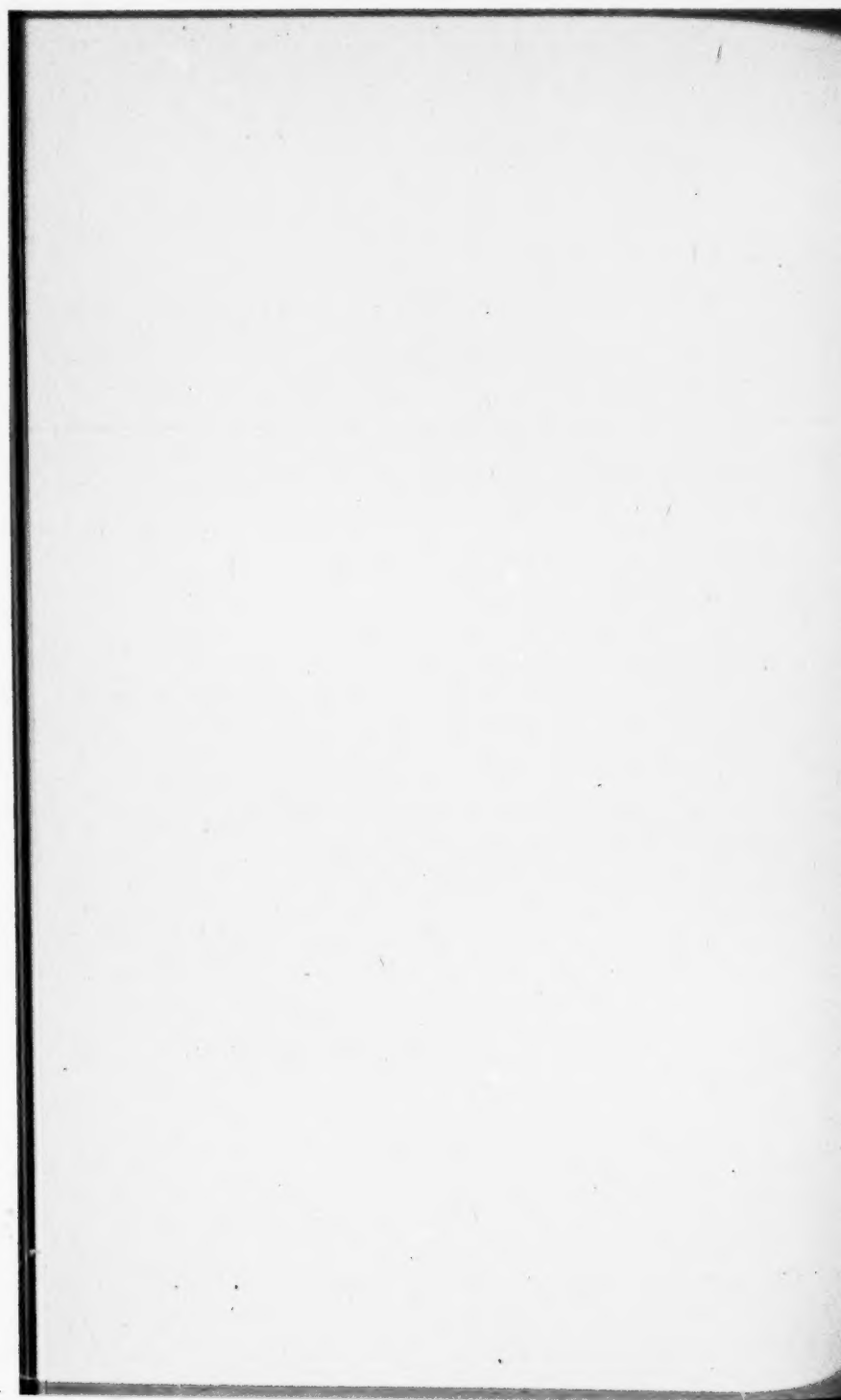
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No.

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WILLIAM K. JACOBS, JR.,

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vs.

JANE M. HOEY, as executrix of the Estate of JAMES J. HOEY,  
Deceased,

Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

---

***Petition***

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, William K. Jacobs, Jr., by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on July 16, 1943, affirming the decision of the United States District Court for the Southern District of New York.

### ***Summary Statement of Matter Involved***

This action was brought in the United States District Court for the Southern District of New York for the refund of \$17,023.93 representing overpayment of income taxes for the years 1936 and 1937. Plaintiff, one of the five executors of the estate of Aaron E. Norman, deceased, requested and received from said estate on account of executor's commissions, advances of \$20,000 in 1936 and \$19,500 in 1937. Plaintiff included said sums in his income tax returns for said years and now contends that as a result thereof he overpaid taxes to the extent of \$9,835.74 in 1936 and \$7,188.19 in 1937. The Surrogate of New York County, having jurisdiction of the estate, did not approve the executors' accounts or authorize payment of their commissions until 1938.

Trial was had without a jury on November 12 and 13, 1942 before Judge Vincent L. Leibell. Judgment for defendant was entered on February 4, 1943 (R. 240). An appeal to the Circuit Court of Appeals for the Second Circuit was taken on February 4, 1943 (R. 242). The cause was argued on May 21, 1943 and on June 30, 1943, a decision was handed down whereby the judgment of the District Court was affirmed (R. 246). Judgment was entered on July 16, 1943 (R. 251).

### ***Opinions Below***

The opinion of the United States District Court for the Southern District of New York (R. 219) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 246) written by Judge Augustus N. Hand is reported at 136 F. (2d) 954.



### ***Jurisdiction***

The judgment of the Circuit Court of Appeals was entered on July 16, 1943 (R. 251). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. A. §347[a]).

### ***The Question Involved***

Whether for Federal Income Tax purposes, payments advanced to an executor on account of commissions are taxable in the year of receipt, or in the year in which the commissions are finally approved by the Surrogate having jurisdiction over the estate where under pertinent local law no commissions can legally be taken until such approval.

### ***Statutes Involved***

The applicable statutes, Sections 22 and 42 of Title 26, U. S. C. A. and Section 285 of the Surrogate's Court Act of New York insofar as relevant are set forth in the appendix.

### ***Statement of Facts***

The plaintiff alone testified, and offered numerous corroborating documents as exhibits. Defendant called no witnesses.

The relevant testimony and exhibits disclose that the will and codicils of Aaron E. Norman, deceased (Ex. N,\*

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\* When an exhibit is referred to, the first reference indicates the page at which it was offered in evidence, the second reference indicates the page at which the exhibit appears.

R. 14, 114-130) were duly admitted to probate in the Surrogate's Court of New York County on August 3, 1936 (Ex. O, R. 14, 131). The will divided a gross estate in excess of \$3,000,000 (Ex. R, R. 32, 140; Finding of Fact 3, R. 229) among a number of beneficiaries. There were several small bequests, a large bequest of \$1,000,000 (Ex. R, R. 32, 147-151) and the creation of equal life interests in the residuary for the benefit of decedent's son and daughter. The remaindermen of these life interests were the daughter's three infant children and the son's two infant children (Ex. R, R. 32, 149-151; Finding of Fact 5, R. 230).

The plaintiff and four others named as executors, qualified on August 3, 1936 and entered upon their duties (R. 14; Finding of Fact 4, R. 229). The estate did not advertise for the presentation of creditors' claims (R. 14). On December 17, 1936, the executors executed an agreement in writing whereby three of them waived their rights to commissions, and the plaintiff and one other were to receive as commission a fixed percentage. This agreement by its terms was executed subject to approval of the Surrogate (Ex. P, R. 15, 132; Finding of Fact 6, R. 230). However, same was not submitted to the Surrogate for approval until the executors' account was filed in the Fall of 1938 (Finding of Fact 43, R. 237).

Shortly after the execution of this agreement, plaintiff requested the other executors for an advance on account of commissions (R. 16). The attorneys for the estate advised the executors that such advances, while illegal, were common (R. 18). Plaintiff thereupon orally agreed to indemnify and hold the other executors harmless from any liability that might arise by virtue of such an advance

(R. 18-19; Finding of Fact 7, R. 231). On December 23, 1936, plaintiff received from the estate an advance on account of executors' commissions in the sum of \$20,000 (R. 19; Ex. B, R. 19, 109).

In December of 1937, plaintiff again requested an advance and again made an oral agreement of indemnification, whereupon he received a further net advance of \$19,500 (R. 24, 26).

None of the parties interested in the estate except the other executors had been apprised of these advances. At the time of receiving these payments, the administration of the estate was in its early stages: The specific bequest of \$1,000,000 had not been paid (R. 21), the trusts had not yet been set up (R. 21), the estate tax had not been discharged (R. 21, 26-27), the guardians of the infant remaindermen had not been appointed (R. 21), and all creditors' claims had not yet been adjusted (R. 27). The Surrogate had not made the direction of the manner in which the value of real or personal property was to be determined; had not been apprised of the executors' agreement as to their compensation and had not determined the question of apportioning commissions among the executors (Findings of Fact 14, 31, 32, R. 232, 234, 235).

By advice of counsel embodied in a letter dated March 4, 1937 (Ex. W, R. 22, 177-9), plaintiff included the 1936 advance as part of his gross income and paid a tax thereon (R. 23; Ex. E, R. 23, 103; Finding of Fact 21, R. 233). On the same advice he did likewise with respect to the advance received in 1937 (R. 28; Ex. F, R. 29, 103; Finding of Fact 21, R. 233). Also, on advice of counsel (Ex. W, R. 22, 177-9) plaintiff made timely requests for refunds (R. 29; Ex. J, R. 30, 105; Finding of Fact 29, R. 234; Ex. K, R. 30, 106;

Finding of Fact 30, R. 234). These refund claims were rejected by the Internal Revenue Department (Ex. J-1, R. 30, 113; Ex. T, R. 31, 172).

On November 4, 1938, the executors filed an intermediate account (Finding of Fact 34, R. 235) and therein for the first time directed the Surrogate's attention to the earlier agreement on commissions (Finding of Fact 43, R. 237). This account was occasioned by the need for disposing of a number of minor problems and of obtaining a determination in respect to a disputed claim of \$700,000 against the estate (R. 31, Finding of Fact 35, R. 235) which the executors had every reason to believe would be litigated (Finding of Fact 40, R. 236). Immediately prior to the entry of the decree approving the account, the estate was relieved of this liability through a settlement, the financial burden of which was shouldered by others (R. 33; Finding of Fact 40, R. 236). On December 27, 1938, the Surrogate's decree approving the account and awarding the commissions was entered (Ex. Q, R. 34, 133).

On March 15, 1939, plaintiff filed his income tax return for the year 1938 (R. 46; Ex. G, R. 46, 104; Finding of Fact 46, R. 238) and explained therein that the Court had allowed him commissions of \$40,278.57 in the year 1938, but that inasmuch as he had paid taxes on a substantial part in the years 1936 and 1937, and his application for refund of said taxes had been rejected, that he had not included said commissions in the 1938 return although he believes same properly includible therein (Ex. G, R. 46, 104). Thereafter, plaintiff received a notice for a deficiency for the year 1938 upon the theory that taxes were payable on all of the commissions in the year when the final account thereof was fixed by the Surrogate (Ex. U, R. 48, 173; Finding of Fact 47, R. 238). Litigation in regard to this

deficiency assessment is presently pending before the United States Board of Tax Appeals (R. 49; Ex. AA, R. 49, 186; Ex. BB, R. 49, 192; Finding of Fact 48, R. 238).

These are the essential facts showing the circumstances under which the advances were made in 1936 and 1937, the need for an accounting in 1938, the judicial approval of the executors' commissions in 1938, and the precipitation of the question here presented as to whether such advances were part of gross income in the years when they were received.

### ***Specification of Errors to be Urged***

The Circuit Court erred:

1. In holding that the commissions advanced to the petitioner in 1936 and 1937 were income to him in those years, rather than in 1938 when the Surrogate approved these commissions.
2. In erroneously applying the "claim of right" doctrine in the *North American Oil* case\* to payments made when there was neither the right to demand nor the duty to make such payments.
3. In not looking to the laws of the State of New York to determine the character of the commissions received in advance of Surrogate's approval.

### ***Reasons for Granting the Writ of Certiorari***

1. The decision of the Circuit Court below is in direct conflict with the decision of the Circuit Court of Appeals

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\* *North American Oil Consolidated v. Burnet*, 286 U. S. 417, 423, 424, 52 S. Ct. 613, 76 L. Ed. 1197.

for the Third Circuit in *Commissioner v. Cadwalader*, 88 F. (2d) 274; certiorari denied 301 U. S. 706. In the *Cadwalader* case the Third Circuit expressly held that in the State of New Jersey, where as in New York, executors are not entitled to commissions until the executors file their account and the commissions are allowed by the Orphans' Court, the executrices were taxable on commissions in the year when they were allowed by the Orphans' Court, although such commissions had been advanced to them in a prior year. The Court below in the instant case takes the opposite view—holding the advance commissions taxable in the year of receipt.

2. This case presents an important question on Federal Tax law of general interest to many taxpayers and to the Commissioner of Internal Revenue. The question has not been, but should be, definitely settled by this Court. By the multitude of cases in numerous states raising the issue of the propriety of an executor's taking commissions in advance of court approval, it is apparent that this practice is quite popular. It should, therefore, be finally determined when such commissions are taxable.

3. As a correlative to point "2" this Court should determine whether the Federal Courts are bound by decisions of the State Court holding such advances illegal under state legislation.

4. The Circuit Court below erroneously applied the "claim of right" doctrine set forth in *North American Oil Consolidated v. Burnet*, 286 U. S. 417, 423, 424, 52 S. Ct. 613, 76 L. Ed. 1197.

The doctrine is embodied in the opinion by Mr. Justice Brandeis which states in part:

"If a taxpayer receives earnings under a claim of right and without restriction as to its disposition he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

A review of the facts in the *Burnet* case indicates exactly what this doctrine means. The Oil Company had operated certain land and the United States Government under a claim of title had instituted suit to oust the Company from possession. A receiver was appointed. He operated the land and derived substantial profits therefrom during the year 1916. In 1917, the suit was decided in favor of the Oil Company, the receiver was discharged and the profits turned over to the Oil Company. The Government took an appeal to the Circuit Court of Appeals. In 1920, that Court affirmed the decree and in 1922 a further appeal to the Supreme Court was dismissed by stipulation.

The question before the Supreme Court was in what year were the profits taxable to the Oil Company. The Supreme Court held that such money was not income in 1916 because "at no time during that year was there a right in the company to demand that the receiver pay over the money", that it was not income in 1922, the year in which the ownership litigation was finally terminated, but that it "became income of the company in 1917, when it first became entitled to them and when it actually received them."

This latter quotation precisely indicates what is meant when one receives money under a "claim of right". Note the word "and". A taxpayer cannot be said to have received money under a "claim of right" merely because he has received the money, he must also be legally entitled to receive the money. It should also be noted that in the *Burnet* case the duty to pay the money to the company, which made the Company entitled to receive it, was established by legal adjudication in its favor.

The Supreme Court has given to the words "claim of right" a definite legal connotation. They cannot be loosely applied to any circumstances where money is simply requested and received, nor interpreted to mean any claim short of larcenous. Payment under "claim of right" refers to a receipt when the recipient had a right to demand payment and when the paying party was under a duty to pay.

The Circuit Court below misapplied the doctrine to include receipt of payment when there was no right to demand nor duty to pay.

The New York law is well settled that under Section 285 of the Surrogate Court Act the right of an executor to commissions depends not only upon the rendition of the services, but also upon the settlement of the account. Until both events have occurred, the executor is not legally entitled to commissions (*Oakeshott v. Smith*, 104 App. Div. 284; aff'd 185 N. Y. 583, 78 N. E. 1108; *Beard v. Beard*, 140 N. Y. 260, 35 N. E. 488; *In re Bates' Estate*, 167 Misc. 641).

Hence, by deciding that the petitioner in the instant case when he took his commissions before the settlement of the estate accounting took under claim of right, the Circuit Court extended the doctrine of the *Burnet* case to an un contemplated degree.



First, it changed the determination of whether the taxpayer was entitled to the money when he received it from a question of law upon receipt to a question of fact to be resolved in the light of subsequent events. In the instant case, petitioner was not entitled to the advances in 1936 and 1937 because the legal adjudication namely, the Surrogate's award of commissions was lacking. In point of fact there existed numerous possibilities that the Surrogate might not award the commissions already advanced, be it for misfeasance, malfeasance, neglect the death of the executor, the non-approval by the Surrogate of the agreement as to the appropriation of fees, or for a host of other reasons (R. 21, 26, 27). It was only in 1938 upon the handing down of the decree by the Surrogate was it first determined that petitioner was entitled to the commissions. Until then the advances were mere loans. (*In re Julia's Estate*, 3 N. J. Misc. 976; 130 A. 733, 735.)

Second, the Court below added degrees of legality or rather of illegality to the doctrine, additions never intended by the Supreme Court. The *Burnet* case succinctly stated that the money became income when the Company "first became entitled to them and when it actually received them." Therefore, a taxpayer in order to take under a claim of right must have been entitled to receive the money. The word "entitled" means what it says—the legal right to receive. The Circuit Court below mistakenly held the receipts in question as payments under a "claim of right" because no fraud was involved—though it was definitely illegal—and because by hind sight it would appear that no serious doubt existed that the Surrogate would ultimately decree payment of commission exceeding the amounts improperly advanced.

The controlling factor herein is that plaintiff did not have the right to demand and the estate did not have the duty to pay advances of commissions in 1936 and 1937. It is, therefore, contended that the moneys received by the plaintiff were not so received under a claim of right; they were not compensation for personal services within the meaning of Section 22 of the Revenue Act and were, therefore, not taxable income.

It is respectfully submitted that the points at issue should be decided by this Honorable Court.

WHEREFORE, it is prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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